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JAMES H. McKENNEY,
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BRIEF FOR PLAINTIFF IN ERROR IN REPLY

TO THE POINT THAT THE JUDGMENT OF THE STATE COURT WAS NOT BASED UPON ANY FEDERAL QUESTION, AND THAT THIS COURT IS WITHOUT JURISDICTION TO REVIEW IT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1903. No. 61.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan.

Reply by Plaintiff in Error to point in brief for Defendant in Error that the judgment of the Supreme Court of Michigan was not based upon any Federal question, and this Court is without jurisdiction to review it.

The point stated above appears in the brief, p. 39-40.

We contend that the judgment of the Supreme Court of Michigan is reviewable by this Court.

1. Section 709, Rev. Stat., provides that a final judgment or decree in any suit in the highest Court of a state in which a decision in the suit could be had where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity, or where any right is claimed under the Constitution of the United States, and the decision is against the right specially set up or claimed by either party under such Constitu-

tion, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

2. All the things necessary to give this Court jurisdiction to review the judgment of the Supreme Court of Michigan, appear in this case.

3. The proceeding was instituted to compel the Railroad Company to reduce the rates of passenger fares on its railroad to two and a half cents per mile, the rate fixed by a statute of the state for railroads, the gross earnings of whose passenger trains are more than $2,000, and less than $3,000 per mile. The petition averred, the statute, the incorporation of the company, that the report of the company showed that the gross earnings for the year 1900 of its passenger trains were more than $2,000 and less than $3,000 per mile; that notice had been given to the company to reduce its rates, and that it had refused, and prayed that the writ of mandamus be granted to compel the defendant to reduce the fares to two and a half cents.

4. The defendant in its answer to the petition, rested its defense upon three grounds,

> first, that the Statute of Michigan, as construed by the Supreme Court of the state, is repugnant to the Constitution of the United States. Fourteenth Amendment. Ans., par. I and II.
>
> second, and to the provision of the Constitution, Art. I, Sec. 8, clause 3, which vests in Congress exclusive power to regulate commerce between the states. Par. V.
>
> third, that the rate sought to be enforced would be unreasonable and not just or adequate compensation for the transportation to which it relates, and that the enforcement of such rate would deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws in violation of the Fourteenth Amendment. Par. III, IV, VI, and VII.

It is also averred that if earnings from interstate business were excluded in computing gross earnings for the purposes of the statute, they would be less than $2,000 per mile, and the company would not be subject to the proposed rate, even under the terms of the statute. Par. V.

5. The relator filed a demurrer to the answer. The

demurrer admits the truth of the allegations of fact in the answer, that the rate would be unjust and unreasonable, and that the gross earnings would be less than $2,000 per mile if the earnings from interstate business were not included.

6. The record in this case not only presents Federal questions, but it presents no question which is not Federal.

7. By the answer of the defendant filed in the Court below, there were drawn in question the validity of the statute fixing rates upon which the proceeding was founded, and of the authority sought to be exercised thereunder to compel the defendant to reduce its fares on the ground that they were repugnant to the Constitution, and the decision of the State Court was in favor of their validity. The defendant also by its answer specifically set up and claimed the right under the Constitution to maintain a rate of charges for passenger fares which would be reasonable and afford just compensation for the use of its property, and the right to object to the enforcement of a rate admitted to be unreasonable in fact, and the right to have the reasonableness of the rates of fares for travel on its railroad within the state determined without referring to or including its earnings in interstate business, and the decision of the State Court was against these rights.

8. The proceeding is such as to involve the objections on constitutional grounds to the validity of the statute, and to the enforcement of the unreasonable rate, and to including interstate earnings in computing earnings for the purpose of fixing domestic fares. It was competent for the defendant to make these objections, and to draw in question the validity of the statute, on the ground that it was repugnant to the Constitution, and to claim the right to charge reasonable rates of fares, and to resist the enforcement of an unreasonable rate, and to have its interstate earnings excluded in fixing its domestic fares. All these the defendant did distinctly and specifically aver, set up and claim in its plea in answer to the petition, in proper form and at the proper time.

9. The issue in the case was such, and the objections to the validity of the statute and the claim by the defendant of the

rights stated above, were so placed that the Supreme Court of Michigan, in rendering its judgment that mandamus issue to compel the defendant to reduce its rates to two and a half cents, necessarily overruled and denied those objections and claim of rights by the defendant under the Constitution.

The decision is of necessity in favor of the validity of the statute, and of the authority exercised under it against the objections of the defendant set forth in its answer, and is of necessity against the rights of the defendant under the Constitution set up and claimed in the answer.

10. The necessary effect of a judgment and decision of a State Court upon the issues and questions in the case, rather than the grounds of the decision or the reasons or argument in support of it, as stated in the opinion, must determine whether the case is one for review by this Court or not.

11. It is for this Court in this case ultimately to decide whether or not the Statute of Michigan, fixing rates of fares, as construed by the Supreme Court of the state, is repugnant to the Fourteenth Amendment and to the Commerce clause, and whether or not the enforcement of the rate admitted to be unreasonable, would deprive the company of its property in violation of the Constitution.

12. It is also for this Court in this case to ultimately decide whether or not the defendant has, by its incorporation, waived or estopped itself from insisting upon the rights under the Constitution, which it otherwise would have, to receive reasonable rates of fares, and to resist the enforcement of unreasonable rates, and to object to interstate earnings being taken into account in fixing domestic fares, and from the right which it would otherwise have to object to the invalidity of the statute, on the ground that it is repugnant to the provisions in the Constitution.

13. These questions being in the case, and a decision of them necessary to any judgment in the State Court, the jurisdiction of this Court could not be barred by any form which the State Court could give to its opinion, or by any statement therein of the grounds and reasons for its decision.

14. The record in this case is such in the issues formed and the questions raised as to make proper a review of the judgment by this Court.

The opinion filed in the State Court does not place the decision of that Court upon grounds which bar the jurisdiction of this Court. On the contrary, the grounds of the decision as therein stated are such as to call for a review by this Court.

First, an interpretation is given to the decisions of this Court, in which it has applied the provisions in the Fourteenth Amendment, against the right of a state to enforce upon railroad corporations unreasonable rates of fares, which those decisions do not justify, and which limits their application to corporations only which are organized before the enactment of the laws, a distinction never expressed by this Court. That interpretation is the foundation upon which the judgment of the State Court rests. The very clear decisions of this Court upon the subject of the enforcement of unreasonable rates are recognized only to the extent that it is said that it "appears" to have been decided by the Supreme Court of the United States that the fixing of unreasonable rates is an infringement of the property rights of an existing corporation within the meaning of the Fourteenth Amendment.

Second. It holds that a state, in enacting laws authorizing incorporations for the purpose of owning, using and operating property, can annex to them conditions which are repugnant to the Constitution of the United States, and enforce them upon corporations organized under the laws, and thereby deprive them of their property rights under the Constitution.

Third. It expressly holds that the Legislature of Michigan could impose the acceptance of unreasonable rates (in violation of the Fourteenth Amendment) as a condition of the reorganization and incorporation by purchasers of railroad property on mortgage sale.

Fourth. The right of the State to repeal the statute authorizing such incorporation, although referred to in the opinion, is not involved. The law has not been repealed, but remains in force, and the question is of the right of the state to attach

to it conditions which are in violation of the United States Constitution, and of property rights thereunder.

Rights under the Constitution of the United States, and objections to the constitutionality of the statute, having been expressly and in due time asserted, and the effect of the judgment being to deny those rights and overrule the objections, this Court has jurisdiction to review the judgment, although the State Court did not, in express terms, pass upon the Federal constitutionality of the law.

23 Supreme Court Rep., 237, 239, Andrews vs. Andrews.

23 Supreme Court Rep., 540, 541, Detroit, Ft. Wayne, etc., R. Co. vs. Osborn.

113 U. S., 574, Chicago Life Ins. Co. vs. Needles.

185 U. S., 203, Consolidated Coal Co. vs. Illinois.

15. Counsel for defendant in error do not correctly state the decision of the Supreme Court of Michigan in this case. In the brief, on page 40, it is said that, "The demurrer of appellee raised the question of whether, by its acceptance of the powers and rights conferred by the law through incorporation thereunder, it (the appellant) must not be held to have agreed that its passenger charges should be according to the provisions of that Act. The Michigan Supreme Court so decided. The view taken by the latter Court did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant."

This statement shifts the contention of the state back to the ground first stated in the demurrer filed in the Circuit Court, that the Railroad Company, by its incorporation in 1896, entered into a contract with the state to carry at the rates named in the law. The Circuit Court decided that it did. That ground was abandoned in the Supreme Court, and was not decided by that Court. The demurrer was amended in the Supreme Court so as to change the claim of the state from that of a contract to that stated in the amended demurrer, viz.,

that upon its incorporation in 1896, under the General Railroad Law, respondent became subject to that law and the provision therein, fixing rates of passenger fares, said provision being one of the conditions of its existence.

16. The position taken by counsel in the statement in the brief, on page 40 (part of the statement just quoted), that "The view taken by the latter Court (the Supreme Court of Michigan) did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant," cannot be sustained.

In the first place, the decision of the Michigan Supreme Court is not correctly stated. That Court did not decide that the Railroad Company, by its acceptance of the powers and rights conferred by the law through incorporation thereunder, must be held to have agreed that its passenger charges should be according to the provisions of that Act.

The Supreme Court of Michigan did not place its decision upon any ground independent of, and which did not involve, the Federal questions raised in the case.

The express decision of the Court is that a provision in a state law, imposing unreasonable rates as a condition of incorporation under the law, is not repugnant to the Constitution. The last sentence in the opinion is, "We think the legislation was not unconstitutional." (Pr. Rec., 64.) That is, that the amendment of the statute reducing rates of fares to an unreasonable extent, is not a violation of the Constitution.

The opinion ending with the sentence just quoted begins with the statement that the decisions of this Court apear to be that a statute fixing unreasonable rates violates the Fourteenth Amendment only as to corporations existing before the enactment of the statute.

The questions so decided are essentially Federal. The entire decision and the judgment is based upon them.

This Court has decided that the enforcement upon a railway corporation of a rate which is unreasonable, deprives it of its property without due procees of law, in violation of the Four-

teenth Amendment. The question whether or not a corporation is subject to such enforcement because of the fact that it was organized after the enactment of the statute prescribing the unreasonable rate, notwithstanding the provisions of the Fourteenth Amendment, as construed and applied by this Court, is a Federal question.

The question whether a corporation, organized under a state law, is subject to provisions in that law enacted before its organization which are repugnant to the Constitution of the United States, and is precluded, by the fact of such incorporation, from objecting to their invalidity, when it is sought to enforce them upon it, is a Federal question.

17. The case cited by counsel for defendant in error in support of their fourth point (Brief, on page 39), 166 U. S., 489, The Electric Co. vs. Dow, does not support their contention. No right of the Electric Co. under the Constitution of the United States was infringed, and the facts of the case presented no Federal question. The suit was instituted by petition by Dow for the assessment of damages for injury to his land, by an overflow caused by a dam erected by the defendant. The company filed a cross petition praying for an inquisition into the question of damages. The proceedings were had under the General Mill Act of the state of New Hampshire, passed in 1868. Both parties demanded a trial by jury,, which resulted in a verdict for Dow of $1,500. The only objection in the case was as to the addition to the verdict of fifty per cent. under a provision of the statute. It could not be claimed that the right to maintain the dam was one under any provision in the National Constitution, nor that the method prescribed by the law for assessing the damages was repugnant to any provision in that Constitution. Therefore it was truly said that the decision of the Supreme Court of the state that the Electric Co. was bound by the provision in the law relating to the assessment of damages was not based on any Federal question, and the writ of error was dismissed. The decision has no application to the present case, nor has either of the three cases cited in it.

18. The present case falls within decisions of this Court in which its jurisdiction has been sustained.

87 U. S. (20 Wall.), 445, Home Insurance C. vs. Morse.

In that case a statute of Wisconsin provided that it should not be lawful for any foreign fire insurance company to transact business in Wisconsin, unless it should first appoint an attorney in that state upon whom process could be served, and file a written agreement that it would not remove a suit for trial into the Federal Courts. The Home Insurance Company made such an appointment, and filed the agreement required. When sued on a policy in a Court of the state, it filed its petition for removal into the Federal Court. The State Court refused to allow the removal, proceeded with the trial, and gave judgment against the company. The Supreme Court of the state affirmed it. Upon writ of error from this Court, the judgment was reversed. This Court decided that the Constitution of the United States secures to citizens of another state than that in which suit is brought, the right to remove their cases to the Federal Court, that the statute of Wisconsin, which sought to prohibit such removal, was repugnant to the Constitution and was void, and that the agreement by the Insurance Company under the statute derived no support from the unconstitutional statute, and was void.

We have in that case one in which the Insurance Company could not do business in the state of Wisconsin at all without the consent of the state. The state gave its consent, and annexed to it the condition that the company should surrender its right under the Constitution. The company accepted the statute, engaged in business in the state, and filed the agreement in writing against removal, which the statute required. This Court decided that the company was not bound by the unconstitutional condition imposed by the statute, and expressly assented to by the company, and found in the decision of the Wisconsin Court, as to the effect and operation of the state law and its acceptance by the company, a Federal question for review by this Court, and reversed it.

In *121 U. S., 186, Barron vs. Burnside*, a similar decision affecting a statute of the state of Iowa was made.

In *146 U. S., 202, the Southern Pacific Co. vs. Denton*, this Court decided that a state statute requiring a corporation, as a condition to obtaining a permit to do business within the state, to surrender a right secured to it by the Constitution of the United States, is unconstitutional, and gives no validity or effect to any agreement or action of the corporation in obedience to its provisions.

The decisions in these three cases are against the claim on the part of the state that the Railroad Company in this case is subject to the unconstitutional provisions, and to the enforcement of the unreasonable rate because of its incorporation, and against the point by counsel for defendant in error that the decision of the Supreme Court of Michigan involves no Federal question, and is final, and that this Court has no jurisdiction.

19. The decision of the State Court relates only to the objection that the rate is unreasonable, and that the enforcement of it would deprive the company of its property in violation of the Fourteenth Amendment. The points decided were, (1) that a state statute imposing unreasonable rates would, under the decisions of this Court, be unconstitutional only as to existing corporations; (2) that the rate in question could not be enforced upon the original company organized before the amendment of the statute; (3) that it was competent for the Legislature to make the acceptance of unreasonable rates a condition of incorporation by the purchasers of the property on mortgage sale.

We have argued that the question so decided is Federal in its character, and that it involves the Federal questions raised by the defendant in the case.

If it should be held otherwise, it would not be sufficient to dispose of the case. It would affect only the objection based upon the unreasonableness of the rates. It would not affect the other Federal questions that the statute, as construed, is under the decisions of this Court repugnant to the Fourteenth Amendment (Assignments of Error II and III), and to the

Commerce Clause. (Assignment of Error VI.) It has not been decided by the State Court upon any ground, and could not be, that the defendant, by its incorporation in 1896, became bound by the construction given to the statute in 1901 by the decision that gross earnings must include interstate earnings, and that it is precluded from the objection that that decision gave to the statute a construction which placed it in conflict with the commerce provision in the Constitution. This question enters essentially into the other one as to the unreasonableness of the rates. If it is not competent, under the Constitution, to include earnings from interstate business in the computation for the purpose of fixing rates of domestic fares, the earnings of this company would be less than $2,000 per mile, and the terms of the statute, as amended, would not be applicable to its business There would, in that case, be no ground for any proceeding to enforce the two and a half cent rate on the defendant.

We submit, that the State Supreme Court did not decide the case upon a non-federal question not involving the Federal questions asserted by the plaintiff in error upon the record, and sufficient to support the judgment independent of those questions, and that this Court has jurisdiction to review the judgment.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.